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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

OCTOBER TERM, 1968

CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm; and CLINT CAVIN, Surety ..... *Petitioners*

v.

ROBERT WINTERS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

Petitioners petition this court for a Writ of Certiorari to the United States Court of Appeals for the 8th Circuit to review a judgment entered in this case on February 25, 1969, wherein the Circuit Court of Appeals for the 8th Circuit affirmed an order of the United States District Court for the Eastern District of Arkansas, Western Division, granting petitioners' petition for a Writ of Habeas Corpus.

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Arkansas, Western Division, is reported in 281 F. Supp. 793. The opinion and judgment of the United States Court of Appeals for the 8th Circuit are not yet reported. A copy of the district court opinion is set forth in Appendix "A" and a copy of the opinion of the United States Circuit Court of Appeals for the 8th Circuit is set forth in Appendix "B" to this Petition for Certiorari.

JURISDICTION

The judgment sought to be reviewed in this case was entered on February 25, 1969. Jurisdiction of the United States Supreme Court to review the judgment of the United States Court of Appeals for the 8th Circuit in this case is by petition for Writ of Certiorari pursuant to 28 U.S.C.A. §1254.

QUESTION PRESENTED

The 8th Circuit Court of Appeals erred in holding that the petitioner was denied constitutional rights to counsel. In other words, the 8th Circuit Court of Appeals has held that the 6th and 14th Amendments to the United States Constitution requiring Arkansas to appoint counsel in this misdemeanor case and in effect has held *Ark. Stat. Ann.* §43-1203 and the Arkansas practice thereunder pursuant to the cases of *Winters* v. *Beck,* 239 Ark. 1151, 397 S.W. 2d 364 and *Cableton* v. *State,* 243 Ark. 351, 420 S.W. 2d 534 unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTE

The United States Constitutional Provisions involved herein are amendments 6 and 14 §1, of the United States Constitution. Amendment 6 can be found in U.S.C.A., CONSTITUTION, Amendment 6 to 14, page 4. Amendment 14 §1 can be found in U.S.C.A., CONSTITUTION, Amendment 14 to end at page 4.

Amendment 6 provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment 14 §1 provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Arkansas Constitutional Provision involved herein is Article 2 §10 and can be found in Ark. Stat. Ann., CONSTITUTION, Vol. 1 p. 33. It provides as follows:

> "In all criminal prosecution the accused shall enjoy the right to a speedy and public trial by im-

> partial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found upon the application of the accused, in such manner as now is, or may be, prescribed by law; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to be heard by himself and his counsel."

The statute involved herein is *Ark. Stat. Ann.* §43-1203 and can be found in Vol. 4A, CRIMINAL PROCEDURE, page 81. It provides as follows:

> "If any person about to be arraigned upon an indictment for a felony, be without counsel to conduct his defense, and shall be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two [2], who shall have free access to the prisoner at all reasonable hours."

STATEMENT

On May 13, 1965, Robert Winters, was tried and convicted in the Little Rock Municipal Court of immorality, a misdemeanor defined by city ordinance. It is Number 25-121 and is set out in Appendix "C". He was sentenced to 30 days in jail and fined $254.00, which included costs. Winters was delivered to the Superintendent of the Pulaski County Penal Farm to serve his sentence as provided in *Ark. Stat. Ann.* §46-502, et seq. Winters was not represented by counsel in the Municipal Court. He did not ask for the assistance of counsel, nor did the trial judge inform him of any right to counsel. Although he would have been entitled to trial de novo in the Pulaski County Circuit Court, no appeal was perfected. While serving his sentence, he obtained counsel and filed a Petition for a Writ of Habeas Corpus before the Pulaski County Circuit Court, where it was denied. The Circuit Court ruling was sustained on appeal by the Arkansas Supreme Court. The opinion of the Supreme Court appears in 239 Ark. 1151, 397 S.W. 2d 364. Certiorari was sought to the United States Supreme Court, and denied. 385 U.S. 907 (Mr. Justice Stewart dissenting).

While the appeal was pending to the Arkansas Supreme Court Winters was admitted to bail and still remains at freedom at $100.00 bond.

Following the denial of Certiorari by the United States Supreme Court which exhausted State remedies, Winters filed a Petition for a Writ of Habeas Corpus on November 8, 1966, in the United States District Court for the Eastern District of Arkansas, alleging, among other points, that he had been tried and convicted without benefit of counsel and, therefore, in violation of his

Constitutional Rights. Initially the District Court dismissed the petition because the petitioner being at liberty on bond was not "in custody" as is required by 23 U.S.C.A. §2341. However, a certificate of probable cause was obtained in the United States Court of Appeals for the 8th Circuit, which court on appeal remanded the cause to the District Court for rehearing on the merits in conformity with the teachings of the Supreme Court in *Jones* v. *Cunningham*, 371 U.S. 236 (1963) on "rehearing" the District Court ruled that the petitioner was not "in custody" and, therefore, the District Court had no authority, but that the court acting in conformance with the remand order of the court of appeals would decide the merits of the case. In deciding the case on its merits the court considered three points and ruled for petitioner on one — the denial of counsel. In short, Judge Young held a hearing and in his opinion found that "the interaction of the 'dollar-a-day' statute of Arkansas with a $254.00 fine plus a thirty day jail sentence constituted a 'serious offense', and the failure of the trial court to notify petitioner of his right to the assistance of counsel and offer him counsel if he was unable financially to retain counsel, rendered the judgment of conviction and sentence constitutionally invalid."

We filed a notice of appeal in the District Court which court issued a certificate of probable cause and an appeal was taken to the 8th Circuit Court of Appeals. The Circuit Court affirmed the opinion and order of the District Court granting Winters' Petition for Habeas Corpus and petitioners herein have requested and were granted a stay of the mandate in this case until May 13, 1969. The purpose of the stay of mandate being to allow us time to petition the United States Supreme Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the 8th Circuit.

ARGUMENT

The reasons why we feel that certiorari should be granted in this case are because the 8th Circuit Court of Appeals has decided an important state question in a way in conflict with state law, has decided an important question of federal law which has not been, but should be, settled by this court and has decided a federal question in a way in conflict with applicable decisions of this court.

Ark. Stat. Ann. §43-1203 provides for the appointment of counsel for indigents in felony cases. The Arkansas Supreme Court in *Winters* v. *Beck,* 239 Ark. 1151, 397 S.W. 2d 364, and *Cableton* v. *State,* 243 Ark. 351, 420 S.W. 2d 534, has held that this statute only applies in felony cases and has refused to constitutionally require appointment of counsel in misdemeanor cases. The decision of the 8th Circuit Court of Appeals has held that an indigent misdemeanor defendant is constitutionally entitled to the appointment of counsel and therefore is in conflict with applicable state law.

In *Winters* v. *Beck,* 385 U.S. 907, the United States Supreme Court refused to grant certiorari on the same question presented herein. The United States Supreme Court, therefore, has not yet decided that an indigent misdemeanor defendant is constitutionally entitled to appointment of counsel. The 8th Circuit Court of Appeals has held that an indigent misdemeanor defendant is constitutionally entitled to counsel and this is an important question of federal law which has not been, but should be, settled by this court.

This court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), held that an indigent felony defendant was con-

stitutionally entitled to the appointment of counsel but expressly refused to extend that right to indigent misdemeanor defendants. The 8th Circuit Court of Appeals has held that an indigent misdemeanor defendant is constitutionally entitled to the appointment of counsel. Therefore, the 8th Circuit Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this court, namely, *Gideon* v. *Wainwright, supra.*

We think the Supreme Court of the United States should grant this Petition for Certiorari in this cause and we can think of no better reason than that given by Mr. Justice Stewart in his dissent in *Winters* v. *Beck*, 385 U.S. 907 as follows:

> "This decision of the Supreme Court of Arkansas is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit, which has held that indigent defendants have a constitutional right to counsel in misdemeanor cases. *McDonald* v. *Moore*, 353 F. 2d 106; *Harvey* v. *Mississippi*, 340 F. 2d 263. This conflict must be resolved, unless the Constitution of the United States is going to mean one thing in Arkansas and something else in Mississippi."

In other words, if Arkansas has to appoint counsel for misdemeants all the other states should also be subject to this requirement.

With these preliminary statements in mind as to why we think this Court should grant this petition for Writ of Certiorari we proceed briefly into our argument on the merits concerning the rights to counsel.

It is undisputed that Winters was neither afforded counsel or advised of any right to have counsel by the

Municipal Court. The reason being that Winters was not entitled to be furnished free counsel by the ruling of any court which is in the line of authority from the Municipal Court to the United States Supreme Court. When the issue was presented to the Arkansas Supreme Court it ruled against Winters. *Winters* v. *Beck,* 239 Ark. 1151, 397 S.W. 2d 364 (1966). When the issue was presented to the United States Supreme Court, certiorari was denied, 385 U.S. 907.

Traditionally (over 100 years) the State of Arkansas has provided free counsel for indigent defendants in felony cases, *Ark. Stat. Ann.* §43-1203, therefore, the Arkansas Supreme Court when once again faced with the issue of appointed counsel in misdemeanor cases explained in *Cableton* v. *State,* 243 Ark. 351, 358, 420 S.W. 2d 534 (1967):

> "The practical impossibility of implementing a system such as appellant urges is obvious when we consider that there are more justices of the peace in Arkansas than there are resident practicing lawyers and that there are counties in which there are no practicing lawyers. The impact of such a rule would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession."

The Arkansas Supreme Court did not believe that the rule should be changed except by the Arkansas Legislature or the United States Supreme Court. It said:

> "We choose not to anticipate that the Supreme Court of the United States will extend the rule of the *Wainwright* case to misdemeanor cases. We rather choose to hold that the public policy of this state on the right to appoint counsel is expressed in our statutory law. While the statute requiring appointment of counsel in felony cases was adopted

> long before the decision in *Gideon* v. *Wainwright, supra*, we take judicial notice that the General Assembly of our state has met in regular session twice subsequently. We cannot assume that, in failing to extend our law to require appointment of counsel in cases other than felonies, they were ignorant of that decision. Any change in the law of Arkansas, after certiorari was denied in the *Winters* case, should either come through legislative enactment or by an express decision of the United States Supreme Court."

The District and Circuit Courts state that there are some cases in which there is no requirement for appointing counsel, and other cases where appointed counsel is a necessity, and the primary concern of the Courts was in determining where to draw the line. The Courts chose the rule which prevails in the Federal Courts as provided in 18 USCA §1 (3), i.e., counsel need not be provided in petty offenses which are defined as those where the penalty does not exceed imprisonment of six months or a fine of no more than $500.00 or both. Although the city ordinance in question establishes a maximum punishment of thirty days imprisonment and a fine of $250.00, the District and Circuit Courts ruled that the charge constituted more than a petty offense because the fine, if not paid, must be worked out at $1.00 per day. By the Courts' reasoning, there are few, if any, Arkansas statutes which provide for "petty offense." For example, disturbing the peace carries a maximum punishment of $300.00 and six months in jail. *Ark. Stat. Ann.* §41-1401.

The decision on where to draw the line is one which requires the balancing of interest and, therefore, is one which traditionally in the American system of government belongs to the Legislatures, not to the courts. The Arkansas Legislature, recognizing its duty to provide

counsel for indigent persons enacted such legislation almost one hundred years ago. Certainly the Federal Courts should exercise supervision of the States to insure that individual citizens are not denied fundamental constitutional rights. However, the Federal courts should not undertake to decide in each particular case whether or not free counsel should have been afforded an accused. The decisions have recognized the impossibility of furnishing counsel to each and every person accused of a crime. Therefore, the Courts should allow a reasonable latitude to the Legislatures in solving this problem.

In advancing this argument we, nor our Court, do not stand alone in taking the position that indigent misdemeanor defendants are not constitutionally entitled to counsel. This is pointed out by our Supreme Court in the *Cableton decision, supra*:

> "Our decision in the *Winters* case does not stand alone. It has been followed or cited with approval in other jurisdictions. See, *e.g., City of Toledo* v. *Frazier,* 10 Ohio App. 2d 51, 226 N.E. 2d 777; *State* v. *Sherron,* 268 N.C. 694, 151 S.E. 2d 599; *City of New Orleans* v. *Cook,* 249 La. 820, 191 So. 2d 634.
>
> "In Florida, the arena in which at least five of the 'constitutional right to counsel' cases have been originally contested, the Supreme Court has also held that the *Wainwright* case did not apply to misdemeanors. They based their holding that an indigent defendant accused of a misdemeanor was not entitled to appointed counsel on the action of their legislature providing for a public defender for indigents in non-capital felony cases. This, they said, constituted a declaration of the state's public policy. *Fish* v. *State,* 159 So. 2d 866 (Fla.); *Watkins* v. *Morris,* 179 So. 2d 348 (Fla). The

> Ohio court has also found a declaration of public policy in its statutes. *City of Toledo* v. *Frazier, supra.* It is suggested by the Supreme Court of North Carolina that the United States Supreme Court has not put a responsibility upon a state in this field any greater than that imposed by its own statutes. *State* v. *Sherron,* 268 N.C. 694, 151 S. E. 2d 599."

We submit that upon the review of the judgment of the 8th Circuit Court of Appeals that the judgment be reversed and the cause remanded to the District Court with directions to dismiss Winters' petition for Writ of habeas corpus because he was not constitutionally entitled to counsel in this case.

Respectfully submitted,

RICHARD B. ADKISSON
Prosecuting Attorney for Pulaski County

JOE PURCELL
Attorney General of Arkansas

DON LANGSTON
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201

Attorneys for Petitioners

APPENDIX A

Filed March 5, 1968, Louise A. Rohan, Acting Clerk
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ROBERT WINTERS ..... *Plaintiff*

v. No. LR-66-C-227

CAPTAIN HENRY BECK,
Superintendent of the
Pulaski County Penal Farm; and
CLINT CAVIN, Surety ..... *Defendants*

MEMORANDUM OPINION

On May 13, 1965 the petitioner, Robert Winters, was convicted in the Little Rock Municipal Court of immorality, a misdemeanor under the provisions of a City Ordinance. His punishment was fixed at 30 days in jail and a fine of $254.00, including costs. Being an indigent and unable to pay the fine, he was sentenced to the Pulaski County Penal Farm for a total of 284 days as provided in Ark. Stats. Ann 19 §2416 (1956 Repl. Vol.).[1]

At his trial petitioner was not represented by counsel. He did not ask for the assistance of counsel, nor was he informed by the trial judge of any right to counsel.

NOTE 1: "19-2416. **Persons in jail for violation of city or town ordinance may be required to work on streets and improvements.** — Prisoners confined in the county jail or city prison, by sentence of the Mayor or Police Court, for a violation of a city or town by-law, or ordinance, or regulation, may, by ordinance, be required to work out the amount of all fines, penalties, forfeitures and costs, at the rate of one dollar ($1.00) per day on the streets or other improvement, under the control of the City Council. (Act Mar. 9, 1875)

Petitioner did not exercise his right by appeal to a trial de novo in the Pulaski County Circuit Court for the reason, it is alleged in the pending petition, that "not having the advice of counsel, petitioner was not aware of further remedies provided by the Law of Arkansas."

After his time for appeal had expired, and having served a portion of his sentence, he secured counsel, who filed a petition for a writ of habeas corpus, which was denied in both the Little Rock Municipal Court and the Pulaski Circuit Court. He appealed to the Supreme Court of Arkansas, alleging that his constitutional rights were violated because no lawyer had been appointed to defend him on the misdemeanor charge in the Municipal Court. The Supreme Court denied his petition, saying that Winters had not indicated that he wanted an attorney, and: "We have held that no duty is imposed upon the trial court to appoint counsel for a defendant charged with a misdemeanor." 239 Ark. 1151, 397 S.W. 2d 364.

The Supreme Court of the United States denied certiorari, 385 U.S. 907, Justices Black and Stewart dissenting.

Prior to its decision, the Arkansas Supreme Court had admitted petitioner to bail upon a nominal bond of $100.00. He still remains on that bond.

After relief was denied by the United States Supreme Court, Winters filed a petition for writ of habeas corpus in this Court, alleging that his sentence was unconstitutional and void for these reasons:

1. Petitioner was tried and convicted without benefit of counsel and without being advised of his right to counsel;

2. The penalties assessed against him by the Municipal Court of Little Rock deprived him of the equal protection of the laws in that the substitution of 254 days in jail as punishment for his failure to pay his fine and court costs of $254.00 as provided by the Arkansas Statute arbitrarily imposes imprisonment for no other reason than indigency;

3. The ordinance pursuant to which he was convicted violates the due process clause of the Fourteenth Amendment in that it is vague, ambiguous, and uncertain.

On February 14, 1967 the Court dismissed the petition on the ground that the petitioner, being at liberty on bond, was not under such restraint as was necessary to permit him to file a petition for a writ of habeas corpus. *Rowland* v. *State of Arkansas*, 179 F. 2d 709 (8 Cir. 1950).

On March 31, 1967 the United States Court of Appeals for the Eighth Circuit remanded the cause to this Court "for a rehearing on the merits in conformity with the teaching of the Supreme Court of the United States in *Jones* v. *Cunningham*, 371 U.S. 236."

Frankly, it had not occurred to this Court that *Jones* v. *Cunningham* was applicable.

In that case is was said:

> "A United States District Court has jurisdiction under 28 U.S.C. §2241 to grant a writ of habeas corpus 'to a prisoner . . . in custody in violation of the Constitution . . . of the United States.' " 371 U.S. 236.

The question there was whether a state prisoner who had been placed on parole was "in custody" within the mean-

ing of that section. There, as stated in the opinion, p. 242, petitioner was:

> "confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life."

The opinion went on to say, p. 243:

> "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute;"

Petitioner is under no comparable restrictions under his bail here. There is no limitation upon his travel, his employment, his associates, or anything else. He may do as he pleases. He is only required to render himself amenable to the order and process of the court. This is no more restraint than if without bond or bail a summons had been issued directing him to appear before the court and be amenable to its orders.

If the Mandate of the Court of Appeals means that we should consider whether or not the petitioner is in custody as taught in *Jones* v. *Cunningham,* we would hold that he is not and that the petitions should be dismissed as being prematurely brought. However, the Mandate is subject to the construction that the Court of Appeals has found that petitioner is now in such "custody" and

that this Court should hear the petition on its merits. We proceed to do so.

THE ATTACK ON THE ORDINANCE.

Ordinance No. 25-121 of the City of Little Rock reads as follows:

> "It is hereby declared to be a misdemeanor for any person to participate in any public place in any obscene or lascivious conduct, or to engage in any conduct calculated or inclined to promote or encourage immorality, or to invite or entice any person or persons upon any street, alley, road or public place, park or square in Little Rock, to accompany, go with or follow him or her to any place for immoral purposes, and it shall be unlawful for any person to invite, entice or address any person from any door, window, porch or portico of any house or building, to enter any house or to go with, accompany or follow him or her to any place whatever for immoral purposes.
>
> "The term 'public place' is defined to mean any place in which the public as a class is invited, allowed or permitted to enter, and includes the public streets, alleys, sidewalks and thoroughfares, as well as theaters, restaurants, hotels, as well as other places. The term 'public place' is to be interpreted liberally.
>
> "Any person found guilty of violating the provisions of this section shall, upon conviction, be fined in any sum not less than ten dollars, nor more than two hundred and fifty dollars or imprisoned for not less than five days nor more than thirty days, or both fined and imprisoned."

According to the evidence at the trial, petitioner and his woman companion were found in a state of undress on the "bed" in the women's rest room for the use of the

public in a Little Rock hotel. It would seem that this is "obscene or lascivious conduct" in a "public place" by any standard. We do not think that the ordinance is void on its face, nor that its application here violated constitutional principles.

SHOULD COUNSEL BE APPOINTED IN ALL MISDEMEANOR CASES?

Since *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), several courts have considered the problem of whether or not *Gideon* requires that counsel be appointed for defendants in misdemeanor cases. Two of these cases are from the Fifth Circuit — *McDonald* v. *Moore*, 353 F. 2d 106 (1965); and *Harvey* v. *State of Mississippi*, 340 F. 2d 263 — and these cases are cited by Mr. Justice Stewart in his dissent from the denial of certiorari in this case, *Winters* v. *Beck*, *supra*.

In *Harvey* v. *State of Mississippi*, after very informal proceedings before a justice of the peace the defendant entered a plea of guilty, with the understanding that he would receive a fine. Later the judge gave him a sentence imposing a fine of $500 and a 90-day jail sentence. The court carefully avoided deciding whether or not the rule in *Gideon* had been extended to misdemeanor charges in state tribunals, but apparently because of the jail sentence, and relying on the reasoning in *Evans* v. *Rives*, 75 U.S. App. D.C. 242, 126 F. 2d 633 (1942), sustained petitioner's application for a writ of habeas corpus and voided his conviction.

In *McDonald* v. *Moore*, *supra*, the defendant had pleaded guilty in Florida to illegal sale of whiskey, which is a misdemeanor in that state. A sentence of 6-months

in jail or a fine of $250 was imposed. She later attempted to withdraw her plea of guilty on the ground that she was without counsel at the time of arraignment, but this was denied by the court.

In discussing the problem the court said that now, under *Gideon*, states must provide counsel for indigent defendants in criminal cases to the same extent as the United States under like circumstances must do in Federal cases.

The court went on to say:

> "It seems unlikely that a person in a municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or the municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state. If the Constitution requires that counsel be provided in such cases it would seem that in many urban areas there would be a requirement for more lawyers than could be made available."

The court in *McDonald* said that in *Harvey* v. *State*, *supra*, the Fifth Circuit had rejected the "serious offense" rule. It said that it also thought that *Gideon* had repudiated the *Betts* v. *Brady* ad hos special circumstance rule of "an appraisal of the totality of facts in a given case." The opinion said that the court was without authority to authorize the announcement of a petty offense rule. Without setting forth any criterion the court said simply that the facts were similar to those in *Harvey* v. *State* and this was sufficient precedent for the court's order sustaining the application for a writ of habeas corpus and the vacation of conviction.

Two United States District Courts in the Fifth Circuit have held that *Harvey* and *McDonald* required them to enforce the right to counsel in misdemeanor cases in state courts. *Petition of Thomas,* 261 F. Supp. 263 (W.D. La. 1966), *Rutledge* v. *City of Miami,* 267 F. Supp. 885 (S.D. Fla. 1967).

But in the Tenth Circuit in a case involving right to counsel before military tribunals, Chief Judge Murrah said, "And, it is an open question whether the Sixth Amendment right to counsel is applicable in misdemeanor cases." *Kennedy* v. *Commandant, U. S. Disciplinary Barracks,* 377 F. 2d 339 (1967);

There is an excellent discussion of the question in the case of *Creighton* v. *State of North Carolina,* 257 F. Supp. 806, (E.D. N.C. 1966) This also arose on an application for a writ of habeas corpus. Petitioner was convicted of "attempt to commit a felony," which is a misdemeanor in North Carolina, and was sentenced to twelve months in jail. The ground for his application for habeas is that *Gideon* required that counsel be appointed to represent indigents tried for misdemeanor. He had not been represented by counsel. In discussing the practical problems involved, the court said, p. 808:

> "However, unfortunate as it may seem to some, we live in a society where practical considerations must be taken into account. It seems obvious that counsel must be appointed to represent an indigent on trial for his life; it seems equally obvious that it is untenable to appoint counsel for an indigent who has parked too near a fireplug. Somewhere in between these two extremes a line must be drawn — the question for decision today is where."

The court called attention to language used by Mr. Justice Douglas in his dissent in *Bute* v. *People of State of Illinois,* 333 U.S. 640, 682 (1948).

> "It might not be nonsense to draw the *Betts* v. *Brady* line somewhere between that case [a sentence to imprisonment up to twenty years] and the case of one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter . . . yet it is the need for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. . . . That need is measured by the *nature* of the *charge* and the ability of the *average* man to face it alone unaided by an expert in the law."

The court called attention to the fact that Mr. Justice Reed in *Uveges* v. *Commonwealth of Pennsylvania,* 335 U.S. 437 (1948), noted that some members of the Court were of the opinion that the Sixth Amendment through the Fourteenth guarantees counsel in all state criminal proceedings where "serious" crimes are charged.

The District Court in North Carolina came to the conclusion that some misdemeanors involve punishment which results in a substantial deprivation of liberty or property, and in such cases counsel should be appointed to those unable to afford adequate representation.

> "On the other hand, it also recognizes that some offenses must be considered so minor that due process does not and cannot require that the guiding hand of counsel be provided to one charged with such a violation. . . .
>
> "The court believes it unwise to set up arbitrary categories of misdemeanors and hold that in one category an accused is entitled to counsel while in another he is not, preferring instead to leave the matter to the discretion of the trial judge. . . .
>
> "(t)his court thinks it wiser to follow the lead of Mr. Justice Douglas when he said that the need

> for counsel is measured by the nature of the charge (which would include the possible penalty) and the ability of the average man to face it without the aid of counsel, and use this standard as a partial guide to aid the trial judge in the exercise of his discretion. This provides a much more flexible and, the court believes, a much more satisfactory solution to the problem. It recognizes that not every misdemeanor above a traffic violation requires the appointment of counsel while admitting that some cases of traffic violations can be imagined where appointment of counsel should be considered."

The court said that under the facts in this case it would not upset the exercise of discretion by the North Carolina trial judge, and the application for habeas was denied.

Arbo v. *Hegstrom*, 261 F. Supp. 397 (D.C. Conn. 1966). This also involved a petition for a writ of habeas corpus. The defendant had pleaded guilty to a charge of nonsupport, a "non-felony" offense in Connecticut, and was sentenced to a term of one year in jail. Defendant was never told that the state would appoint counsel for him, nor was counsel appointed, although it was within the discretion of the trial judge to do so.

After discussing *Gideon* the court said, p. 400:

> "Of course, from a pragmatic point of view, one can not help but struggle to find some rational line beyond which the absolute right to counsel becomes merely a privilege to be provided only as the particular tribunal sees fit. Although the administration of criminal justice is cloked in abstract principles, these principles are jeopardized if the system could conceivably break under the sheer weight of the demands which it imposes.

> On a federal level, the recent Criminal Justice Act of 1964, 18 U.S.C. §3006A, in recognition of the heavy burden which a requirement of counsel in every criminal case would impose, has made a practical and fair compromise with an absolute rule by prescribing appointment of counsel in other than "petty offense" cases.[2]"
>
> Footnote: "2. 18 U.S.C. §1(3) defines a petty offense as 'any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . . "

The court went on to say that the facts in the case at bar did not demand an extension of *Gideon* because in Connecticut the crime of nonsupport carried the "possibility of a substantial prison sentence" and for the petitioner this possibility became reality. "It would be a gross perversion of solid constitutional doctrine to find a rational distinction between one year in jail (a misdemeanor) and one year and a day in prison (a felony)."

The court said that if there was any vitality left in the "special circumstances" approach in non-felony cases its application would necessitate the issuance of the writ sought. "The single most relevant consideration under this test is the ability of the accused to fend for himself, without benefit of assistance from one trained in the law."

The court held that the failure of the state to apprise petitioner of his right to appointed counsel and to grant him that right if it was requested amounted to a denial of due process.

Another excellent discussion appears in the most recent case we have found, *Brinson* v. *State of Florida, County of Dade,* 273 F. Supp. 840 (S.D. Florida, September 20, 1967). It also arises in the Fifth Circuit.

Brinson filed a petition for a writ of habeas corpus seeking relief from his confinement in the Dade County Jail, Miami, Florida, attacking sentences imposed by the Metropolitan Court of Dade County.

After pleas of not guilty, petitioner was convicted of seven traffic offenses — three of them for careless driving, three for leaving the scene of an accident involving personal injury, and driving while under the influence of intoxicating liquor. The penal court provided penalties as follows:

1. Careless driving — fine not to exceed $300, or imprisonment not to exceed 60 days, or both.

2. Driving while under the influence of intoxicating liquor — for the first conviction, imprisonment not less than 48 hours nor more than 60 days, or by fine not less than $100 nor more than $500, or both; for the second conviction within three years of the first, imprisonment not less than ten days nor more than six months, plus fine; and for a third conviction within five years of first conviction, imprisonment of not less than 30 days nor more than 12 months.

3. Leaving the scene of an accident involving personal injuries — for first conviction, imprisonment for not more than 60 days or a fine of not more than $500, or both. On second or any subsequent conviction, imprisonment of not more than one year or by fine of not more than $1,000, or both.

For each of the careless driving convictions petitioner was sentenced to pay a fine of $50 or serve 5 days in jail; for each of the convictions for leaving the scene of an accident he was sentenced to a jail term of 20 days

and a fine of $200, and in default of payment, an additional term of 20 days; for driving while under the influence of intoxicating liquor he was sentenced to 10 days in jail, a fine of $250, or an additional term of 25 days if the fine were not paid. Thus, he was sentenced to serve a minimum jail term of 70 days, plus a total of 100 more days if he failed to pay the fines. He began serving his time in April, and having failed to pay any of the fine, he remained there until the Federal district court ordered his release in September.

The petitioner was not advised of a right to counsel or that an attorney would be appointed to represent him if he could not afford one.

The court said:

> "It is my opinion that the right to assistance of counsel applies to state court prosecutions for *serious* offenses, whether they be labeled felonies or misdemeanors. . The concept of due process embodied in the Fourteenth Amendment requires counsel for all persons charged with serious crimes. . . .
>
> "In the present case, the petitioner's conviction upon the second offense of leaving the scene of an accident involving personal injuries exposed him to a maximum sentence of imprisonment for one year. The third conviction of the same offense exposed him to the possibility of confinement for an additional year. When a defendant is exposed to possible imprisonment for one year, he is charged with a serious offense. Accordingly, I hold that petitioner was entitled to assistance of counsel in the Metropolitan Court to defend against the two charges aforementioned. The fact that the offense charged was . . . not termed a felony, is of no consequence. . A man who is charged with

> an offense for which he can spend a year in jail is entitled to assistance of counsel regardless of whether the offense be labeled a felony or misdemeanor."

The court pointed out that *Gideon* v. *Wainwright* overruled the "special circumstances" test of *Betts* v. *Brady,* 316 U.S. 455, regarding right to counsel and that the Supreme Court has not explicitly recognized that the existence of the right depends on the seriousness of the penalty in misdemeanor and traffic cases. The concept, however, was utilized by the Supreme Court in the case of *In re Gault,* 387 U.S. I. This case involved a juvenile delinquency proceeding in which Gault was determined to be a delinquent and he was committed to a state institution. On a habeas corpus petition he claimed he was denied right to counsel.

> "The Supreme Court held that due process required that Gault received assistance of counsel because 'the issue . . . whether the child [would] be found to be "delinquent" and subjected to the loss of his liberty for years [was] comparable in *seriousness* to a felony prosecution.' [Emphasis added] 387 U.S. at 36. The 'serious offense' rule, in other words, has been expressly used by the Supreme Court to determine the right to counsel."

The court pointed out that:

> "In *Gault* the court cited the recommendations of the President's Crime Commission that counsel in juvenile cases was necessary to orderly justice. . . . Their recommendation is explicit: 'as quickly as possible . . . counsel [should be provided] to every criminal defendant who faces a *significant penalty* if he cannot afford to provide counsel for himself.' [Emphasis added] . . . The meaning of the recommendation clearly is that all persons charged with a crime, measured by the magnitude

> of the penalty, should be entitled to counsel. On the other hand, the Commission recommends that 'petty charges' should be excluded from coverage."

The court stated that the Criminal Justice Act of 1964, 18 U.S.C. 3006A, divides public offenses into three categories: (1) felonies, (2) misdemeanors, and (3) petty offenses.

> "The Act provides for the appointment of counsel in all cases other than petty offenses. A petty offense is defined as '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both. . . .' Title 18 U.S.C. §1. Not only are funds not provided for court-appointed attorneys, but no duty is placed upon the United States Commissioner or the court to advise the defendant that he has the right to be represented by counsel . . .
>
> . . . . . .
>
> "Accordingly, this Court holds that the constitutional right to counsel in non-felony cases depends upon the maximum possible penalty under the offense charged, this being the test whether or not a 'serious offense' is involved. In order that rights of constitutional stature be uniformly applied, I hold that the minimum offense for which counsel must be provided is one which carries a possible penalty of more than six months imprisonment, which is the line of demarcation drawn in federal practice. In this case, Brinson's second and third conviction of leaving the scene of an accident involving personal injuries must be invalidated since the court failed to notify the defendant of his right to the assistance of counsel."

In a footnote to his dissenting opinion in *Winters* v. *Beck, supra,* Mr. Justice Stewart said, "In Arkansas, some

misdemeanors are punishable by up to three years' imprisonment." [Ark. Stats. Ann. §41-805 (1964 Repl. Vol.).] (The statute cited in this footnote is the penalty provided for conviction of a third offense of illegal cohabitation.)

We do not think that the Sixth Amendment requires the appointment of counsel for indigent defendants in all misdemeanor cases without regard to the nature of the offense charged nor the possible punishment. If we were required to draw a line we would be inclined to follow the Florida District Court in *Brinson* and use the standard of a petty offense as defined in 18 U.S.C. §1(3).

We do not think that on its face the sentence given petitioner here of 30 days in jail plus a fine of $254 including costs, coupled with the relatively simple nature of the charge, is such as to constitute a "serious offense" as that term is used in the cases' discussion of *Gideon*.

Our problem here, however, is complicated by Arkansas' archaic statute adopted in 1875, referred to by Mr. Justice Stewart as the "dollar-a-day" statute. For an indigent, this translates a $254 fine plus 30 days in jail to a total of 284 days' (approximately 9½ months) imprisonment. By any standard this would seem to be a serious deprivation of a defendant's liberty.

MAY AN INDIGENT BE IMPRISONED FOR FAILURE TO PAY A FINE?

It is argued by petitioner that the substitution of 254 days in jail as punishment for petitioner's failure to pay his fine and court costs arbitrarily imposes imprisonment for no other reason than indigency. Petitioner cites *Nemeth* v. *Thomas* 35 Law Week 2320 (N.Y. Sup.

Ct., Dec. 5, 1966), where the defendant was guilty of 138 traffic offenses. Unable to pay the fines, he had been confined in the workhouse for eight months and he still had approximately 12 months left to serve. The court held that continuing imprisonment would constitute "cruel and inhuman punishment" and be in violation of the Equal Protection Clause.

Also cited is a dissenting opinion of Judge Edgerton in *Wildeblood* v. *U. S.*, 284 F. 2d 592 (D.C. Cir. 1960), which indicated that when a person cannot pay a fine and is therefore imprisoned, the constitutional question arises: "Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has."

However, the majority held that when a party is convicted of an offense and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine shall have been paid (citing *Ex Parte Jackson,* 96 U.S. 727, and *Hill* v. *Wampler,* 298 U.S. 460, in which the Supreme Court said: "In the discretion of the Court the judgment may direct also that the defendant shall be imprisoned until the fine is paid . . .").

We are not willing to say that imprisonment in lieu of payment of a fine in the case of an indigent is unconstitutional *per se.* We do say here, however, that the interaction of the "dollar-a-day" statute of Arkansas with a $254 fine plus a 30-day jail sentence constituted a "serious offense," and the failure of the trial court to notify petitioner of his right to the assistance of counsel and offer him counsel if he was unable financially to retain counsel, rendered the judgment of conviction and sentence constitutionally invalid.

An order will be entered by the Court granting the City of Little Rock a reasonable time to retry petitioner. If he is not retried within such period, the writ of habeas corpus will be issued upon application of petitioner's counsel.

Dated: March 5, 1968.

GORDON E. YOUNG

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19,278

Captain Henry Beck, Superintendent of the Pulaski County Penal Farm; and Clint Cavin, Surety, Appellants,

v.

Robert Winters, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[February 25, 1969.]

Before MATTHES, GIBSON and LAY, Circuit Judges.

MATTHES, Circuit Judge.

Captain Henry Beck, Superintendent of the Pulaski County Penal Farm and Clint Cavin, surety,[1] have ap-

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[1] Appellant Clint Cavin is surety on Winters' appearance bond, and apparently was named as a respondent in the habeas corpus proceeding on the theory that Winters is in the technical custody of Cavin. He did not file a responsive pleading in the district court.

pealed from the order of the United States district court granting Robert Winters relief in this habeas corpus proceeding. The history of the litigation giving rise to this appeal is fully and accurately reported in the district court's opinion in *Winters* v. *Beck*, 281 F. Supp. 793 (E.D. Ark. 1968). A brief resume of the relevant facts will suffice for the purpose of this opinion.

Winters, appellee, was tried and convicted without the assistance of counsel in the Municipal Court of Little Rock, Arkansas, for obscene and lascivious conduct proscribed by Little Rock City Ordinance No. 25-121. He received the maximum punishment of 30 days in jail and a fine of $250, to which was added $4 costs. Being an indigent and unable to pay the fine, he was sentenced to the Pulaski County Penal Farm for a total of 284 days as provided by Ark. Stat. Ann. §19-2416 (1968 Repl. Vol.).[2]

After appellee had exhausted his state remedies through habeas corpus proceedings, *Winters* v. *Beck*, 397 S.W. 2d 364 (Ark. 1965), *cert. denied*, 385 U.S. 907 (1966) (Mr. Justice Stewart dissenting) he filed a petition for habeas relief in the United States district court on November 8, 1966. Judge Young initially dismissed appellee's petition on the ground that petitioner was at liberty on bail and not under such restraint as was necessary to require consideration of the petition. On appeal we remanded for a rehearing on the merits in conformity with the teachings of the Supreme Court in *Jones* v. *Cunningham*, 371 U.S. 236 (1933). On remand, Judge Young

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[2] The statute under which appellee was committed provides in effect that prisoners confined in the county jail or city prison, by sentence of the mayor or police court, for a violation of a city ordinance may, by ordinance, be required to work out the amount of all fines, penalties, forfeitures and costs at the rate of $1 per day. Little Rock Ordinance No. 25-121, and §19-2416, Ark. Stat. Ann., are reproduced in the district court's opinion.

held a hearing and in a soundly-reasoned opinion found that "the interaction of the 'dollar-a-day' statute of Arkansas with a $254 fine plus a 30-day jail sentence constituted a 'serious offense,' and the failure of the trial court to notify petitioner of his right to the assistance of counsel and offer him counsel if he was unable financially to retain counsel, rendered the judgment of conviction and sentence constitutionally invalid." 281 F. Supp. at 801-02.

On this appeal, appellants in their brief again questioned appellee's standing to seek habeas relief, their position being that since he was at liberty on bond when he filed his petition in the United States district court, he was not in custody within the meaning of 28 U.S.C. §2241, and consequently the writ was not available to him. Our remand of the district court's first order, motivated by *Jones* v. *Cunningham,* supra, disposed of this issue. In oral argument the Assistant Attorney General of Arkansas with candor conceded there was no merit to the lack of standing issue and expressly abandoned this contention.

The clear-cut question we must decide is whether the district court was correct in holding that appellee was deprived of his Sixth Amendment right to assistance of counsel as applied to the states through the due process clause of the Fourteenth Amendment. We subscribe to Judge Young's conclusion and affirm.

The Attorney General of Arkansas argues for a reversal on the premise that the question of whether an indigent state defendant is entitled to the assistance of counsel is one "which traditionally in the American system of government belongs to the Legislatures, not to the courts." We are reminded that Arkansas has recognized

its responsibility by enacting legislation providing "free counsel" for indigent defendants in felony cases,[3] Ark. Stat. Ann. §43-1203 (1964 Repl. Vol.); that the Supreme Court of Arkansas has held not only that appellee Winters was not entitled to counsel, but has expressly rejected the concept that an indigent defendant charged with a misdemeanor should have the assistance of counsel. *Cableton* v. *State*, 243 Ark. 351, 420 S.W. 2d 534 (1967). The *Cableton* Court was obviously influenced by practical considerations, stating in part: "[T]here are more justices of the peace in Arkansas than there are resident practicing lawyers and there are counties in which there are no practicing lawyers. The impact of such a rule would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession." *Id.* at 538-39.

We are fully cognizant of and appreciate appellants' concern over the federal government intruding into problems which are primarily relegated to the states for resolution. The Supreme. Court recognized the importance of comity between the federal and state courts in *Ker* v. *California*, 374 U.S. 23, 31 (1963).

> "*Mapp* sounded no death-knell for our federalism; rather, it echoed the sentiment of *Elkins* v. *United States*, [364 U.S. 206, 221 (1961)] that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will

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3 Apparently, the legal profession in Arkansas recognizes the need for more effective legislation in this area. The Arkansas Bar Association's Special Committee on the Defense of Criminal Indigents is preparing proposed legislation that would establish a public defender — appointed counsel system in Arkansas not limited to felony cases. See Sizemore, **Defense of Accused Indigents in Arkansas: New Hope or More of the Same**, Arkansas Lawyer, Oct. 1968, at 6.

> be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches.' "

Accord, Jackson v. *Bishop,* 404 F. 2d 571 (8th Cir. Dec. 9, 1968).

The sum of appellants' argument is predicated on the pronouncement of the Supreme Court of Arkansas that "[a]ny change in the law of Arkansas, after certiorari was denied in the *Winters* case, should either come through legislative enactment or by an express decision of the United States Supreme Court." 420 S.W. 2d at 537-38.[4]

Apepllants are correct in suggesting that the Supreme Court of the United States has not expressly extended the Sixth Amendment right to assistance of counsel to misdemeanor cases. We are firmly convinced, however, from the rationale of the decisions of the Supreme Court that the fundamental right to counsel extends to a situation where, as here, the accused has been found guilty of an offense, which has resulted in imprisonment for approximately nine and one-half months.

The Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), in holding that the Sixth Amendment guarantee of the right to assistance of counsel is applicable to the states through the Fourteenth Amendment, proclaimed: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a

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[4] Appellants have placed undue reliance upon denial of certiorari in **Winters v. Beck, supra.** The sole significance of a denial of a petition for writ of certiorari is discussed at some length in **Maryland v. Baltimore Radio Show,** 338 U.S. 912, 917-18 (1950). "[S]uch a denial carries with it no implication whatever regarding the Court's views on the merit of a case which it has declined to review." **Id.** at 919.

lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.[5]

Appellants seem to regard the *Gideon* opinion as limiting the application of the Sixth Amendment to offenses which are characterized as felonies. We are not persuaded that the *Gideon* Court intended to circumscribe the application of its decision to such narrow confines. The Court did not draw a line between felonies and any and all misdemeanors. Indeed, consideration of the opinion in context leads us to conclude that the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time.[6]

It should be remembered that the Sixth Amendment makes no differentiation between misdemeanors and felonies. The right to counsel is not contingent upon the length of the sentence or the gravity of the punishment. Rather, it provides that the guarantee extends to "all criminal prosecutions." Furthermore, we note that the phrase "all criminal prosecutions" applies not only to the right to counsel but also to the right to a jury trial. Logically the phrase should be accorded the same meaning

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5 **Gideon** expressly overruled **Betts v. Brady**, 316 U.S. 455 (1942), in which the Supreme Court refused to hold that the Sixth Amendment right to counsel extended to the states through the Fourteenth Amendment. **Betts** did recognize, however, that where there existed special circumstances, the right to counsel became fundamental and essential so as to require applicability of the Sixth Amendment to the state through the due process clause of the Fourteenth Amendment.

6 Although there is no limitation of the right to appoint counsel in the majority opinion, Mr. Justice Harlan, in a concurring opinion, comments: "Whether the rule should extend to **all** criminal cases need not now be decided." **Id.** at 351. That the reach of **Gideon** is not altogether clear is evidenced by two dissenting opinions of Justices in denials of certiorari in **Winters v. Beck**, 385 U.S. 907 (1966) and **DeJoseph v. Connecticut**, 385 U.S. 982 (1966). In those opinions the Justices call for the Court to clarify its holding in **Gideon.**

as applied to both protections. Thus we believe significant the Supreme Court's pronouncements in cases involving the jury trial guarantee.

In *Duncan* v. *Louisiana,* 391 U.S. 145; 149 (1968), the Supreme Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice," and that the Fourteenth Amendment guarantees a right of jury trial in all state criminal cases "which — were they tried in a federal court — would come within the Sixth Amendment's guarantee." The Court concluded that a jury trial is guaranteed in all "serious offenses" but does not extend to "petty crimes." The *Duncan* Court, however, declined to settle the exact location of the line between petty offenses and serious crimes. It did hold that on the facts before it, where appellant had been sentenced to 60 days in jail and fined $300 for commission of simple battery, a misdemeanor punishable up to two years, he was entitled to a jury trial.

In *Bloom* v. *Illinois,* 391 U.S. 194 (1968), the Court reiterated its holding in *Duncan* and held that the right to jury trial extends to serious criminal contempts and that denial of a jury trial to appellant, who was sentenced to imprisonment for two years, was constitutional error. Conversely, in *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968), the Court did not extend the right to an offense it found petty. *Dyke* involved contemnors who were sentenced under a Tennessee criminal contempt statute that provided for a maximum penalty of 10 days in jail and a fine of $50. Relying on its earlier decision in *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966), where it held that a six-month sentence is short enough to be "petty," the Court reasoned that the petitioners in this case were charged with a "petty offense" and had no federal constitutional right to jury trial.

Equally significant, we believe, is the Court's recent declaration that the right to assistance of counsel extends to juvenile proceedings "which may result in commitment to an institution in which the juvenile's freedom is curtailed." *In Re Gault*, 387 U.S. 1, 41 (1967).[7]

The Fifth Circuit also has been faced with the question of how far the right to counsel extends and has refused to formulate a rigid rule which would either extend the protection to all criminal cases or limit it only to felonies. Rather, in adopting a broad view it expressly ruled that the safeguard extends to misdemeanor cases, but also recognized that there are some offenses where one would not be entitled to the services of an attorney at the expense of the state.[8]

In *Harvey* v. *Mississippi*, 340 F. 2d 263 (5th Cir. 1965), the defendant, without being advised that he was entitled to assistance of counsel, pled guilty to, was convicted of and sentenced to the maximum punishment of a $500 fine and 90 days in jail for possession of whiskey, a misdemeanor in Mississippi. Noting that such a plea had "grievous consequences," the court held that under the facts of the case, defendant was unconstitutionally

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[7] The Court stated:
"The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." **Id.** at 36.

[8] **In MacDonald v. Moore, infra,** the court commented:

"It seems unlikely that a person in a municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or the municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state."

convicted because of the failure to advise him that he was entitled to be furnished counsel.[9]

In *MacDonald* v. *Moore*, 353 F. 2d 106 (1965) the Fifth Circuit reaffirmed its position in *Harvey*. There appellant was charged (1) with illegal sale of gin, and (2) with illegal possession of whiskey and gin, both misdemeanors under Florida law. She pled guilty and was sentenced to 6 months in jail or $250 fine on each charge. Because the facts in the case were so similar to those in *Harvey*, the court stated that it was required to hold that appellant was entitled to assistance of counsel.

Recently, the Fifth Circuit again dealt with the question and expressly held that under the Sixth and Fourteenth Amendments, right to counsel extends to misdemeanor cases. *Goslin* v. *Thomas*, 400 F. 2d 594 (1968).[10] Defendant asserted that he had been denied counsel in four Louisiana misdemeanor proceedings. In the last proceeding, defendant had been sentenced to jail for one year.

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9 The court quoted from **Evans v. Rives**, 126 F. 2d 633, 638 (D.C. Cir. 1942) approvingly:

> "It is . . . suggested . . . . that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses'. No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. . . . And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

10 The lower court's opinion, 261 F. Supp. 263 (W.D. La. 1966), held that under **Harvey** and **MacDonald**, **Gideon** must be applied to all criminal cases. The Court of Appeals for the Fifth Circuit stopped short of this holding, stating that the only question was whether the right to counsel under the Sixth and Fourteenth Amendments extends to state misdemeanor cases.

Based on the rationale of the foregoing authorities,[11] we conclude that the right to counsel cannot be dependent upon the mere arbitrary label that a state legislature attaches to an offense.[12]

We find it unnecessary to decide that all indigents have the right to assistance of counsel in *all* misdemeanor prosecutions, no matter how trivial may be the consequences. Whether a person accused of an offense labeled as a misdemeanor is entitled to counsel must be resolved upon proper consideration of all circumstances relative to the question. In addition to the financial status of the accused, the punishment that may be imposed if he is found guilty is certainly a vital factor. The trial court should fully explore all of the relevant circumstances, and if it is determined that counsel should be provided, the accused must be so informed. Unless he intelligently and knowingly waives the right, counsel

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11 Other federal cases rejecting the misdemeanor-felony dichotomy and holding that the Sixth Amendment right to assistance of counsel extends to misdemeanor prosecutions are: **Brinson v. Florida**, 273 F. Supp. 840 (S.D. Fla. 1967); **Rutledge v. City of Miami**, 267 F. Supp. 885 (S.D. Fla. 1967); **Arbo v. Hegstrom**, 261 F. Supp. 397 (D. Conn. 1966). **See Stubblefield v. Beto**, 399 F. 2d 424, 425 (5th Cir. 1968) (dissenting opinion); **Wilson v. Blabon**, 370 F. 2d 997 (9th Cir. 1967). See also the following articles: Carlson, Appointed **Counsel in Criminal Prosecutions: A Study of Indigent Defense**, 50 Iowa L. Rev. 1073 (1965); Kamisar, **Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values**, 61 Mich. L. Rev. 219 (1962); Kamisar and Choper, **The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations**, 48 Minn. L. Rev. 1 (1963); Milroy, **Court Appointed Counsel for Indigent Misdemeanants**, 6 Ariz. L. Rev. 280 (1965); Comment, **The Right to Counsel for Misdemeanants in State Courts**, 20 Ark L. Rev. 156 (1966).

12 As Mr. Justice Stewart pointed out in his dissent in the Court's denial of certiorari in **Winters v. Beck, supra**, some misdemeanors in Arkansas are punishable by up to three years' imprisonment. Ark. Stat. Ann. §41-805 (1964 Repl. Vol.).

should be furnished. We go no further in attempting to delineate the guidelines.[13]

In summary, it is abundantly clear that the district court correctly decided the question at issue. The order vacating the judgment and sentence is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eight Circuit.

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[13] While we do not formulate and lay down an arbitrary, mechanical rule which could automatically and simply be applied in every case to determine whether the right to assistance of counsel attaches, we do point out some of the various approaches and suggesions promulgated by courts, commissions and statutes. In **Brinson v. Florida**, 273 F. Supp. 840 (S.D. Fla. 1967), the court constructed what it believed to be the proper test: "The right to assistance of counsel is determined by the seriousness of the offense, measured by the gravity of the penalty to which the defendant is exposed on any given violation" **Id.** at 843. The court further stated: "I hold that the minimum offense for which counsel must be provided is one which carries a possible penalty of more than six months imprisonment, which is the line of demarcation drawn in federal practice." **Id.** at 845. The Criminal Justice Act of 1964, 18 U.S.C. §3006(a), provides that appointed counsel in federal courts shall be afforded to indigents in all felony and misdemeanor cases other than petty offenses. The Act defines petty offenses as those punishable by not more than six months imprisonment or $500 fine or both. 18 U.S.C. §1. The ABA's project on Minimum Standards for Criminal Justice in its tentative draft on **Standards Relating to Providing Defense Services** §4.1 (1967) has recommended the following rule:

> "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.

In the **Challenge of Crime in a Free Society. A Report by the President's Commission on Law Enforcement and Administration of Justice** (1967), the commission recommended:

> "The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself. This should apply to cases classified as misdemeanors as well as to those classified as felonies." **Id.** at 150.

In its summary, however, the commission stated that "traffic and similar petty charges" are excluded from this recommendation. **Id.** at viii.

APPENDIX C

LITTLE ROCK CITY ORDINANCE No. 25-121 — It is hereby declared to be a misdemeanor for any person to participate in any public place in any obscene or lascivious conduct, or to engage in any conduct calculated or inclined to promote or encourage immorality, or to invite or entice any person or persons upon any street, alley, road or public place, park or square in Little Rock, to accompany, go with or follow him or her to any place for immoral purposes, and it shall be unlawful for any person to invite, entice, or address any person from any door, window, porch, or portico of any house or building, to enter any house or go with, accompany or follow him or her to any place whatever for immoral purposes.

The term "public place" is defined to mean any place in which the public as a class is invited, allowed or permitted to enter, and includes the public streets, alleys, sidewalks and thoroughfares, as well as theaters, restaurants, hotels, as well as other places. The term "public place" is to be interpreted liberally.

Any person found guilty of violating the provisions of this section shall, upon conviction, be fined in any sum not less than ten dollars, nor more than two hundred and fifty dollars or imprisoned for not less than five days nor more than thirty days, or both fined and imprisoned.

APPENDIX D

Filed Feb. 25, 1969, Robert C. Tucker, Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19278. September Term, 1968

Captain Henry Beck, Superintendent of the Pulaski County Penal Farm; and Clint Cavin, Surety,

Appellants,

vs.

Robert Winters,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court appealed from in this cause be, and is hereby, affirmed.

February 25, 1969

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19278

Captain Henry Beck,
Superintendent, etc., et al.,
Appellants,

vs.

Robert Winters,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

On consideration of the motion of appellants for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for thirty days from and after April 14, 1969, which is May 13, 1969.

If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 7, 1969.

SUPREME COURT, U. S.

MAY 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1368

October Term, 1968

CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm; and CLINT CAVIN, Surety,

Petitioners,

v.

ROBERT WINTERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK GREENBERG
MICHAEL MELTSNER
NORMAN CHACHKIN
10 Columbus Circle
New York, New York, 10019

JOHN WALKER
1820 West 13th Street
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.
Attorneys for Respondent

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IN THE

Supreme Court of the United States

No. 1368

October Term, 1968

CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm; and CLINT CAVIN, Surety,

Petitioners,

v.

ROBERT WINTERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari seeks review of a judgment entered in this case on February 25, 1969 by the Court of Appeals for the Eighth Circuit which affirmed an order of the United States District Court for the Eastern District of Arkansas granting a petition for a writ of habeas corpus. Both courts below held that respondent, an indigent sentenced to nine and one half months in prison, was denied rights guaranteed by the Sixth and Fourteenth Amendments when denied the assistance of counsel pursuant to the Arkansas practice of appointing counsel only in felony cases.

Statement

In 1965, Robert Winters, a 24 year old indigent Negro was convicted of "immorality" in violation of Ordinance No. 25-121 of the City of Little Rock, Arkansas.[1] Respondent and a white female co-defendant (who was charged with petit larceny as well as "immorality") were arrested at approximately 4:15 a.m., on May 13, 1965. They were brought before a judge of the municipal court of the City of Little Rock the same day for trial. Both were convicted. Respondent received a jail sentence of 30 days and a fine of $254.00, including court costs. Persons, like respondent, unable to pay such fines work them off at the Pulaski County Penal Farm at the rate of $1.00 per day, pursuant to Ark. Stat. Ann. §19-2416 (1947). He made no attempt to appeal from this conviction and was accordingly sentenced to prison for a total of 284 days.

At his trial in the municipal court, respondent was unrepresented by counsel. He did not ask for assistance of counsel and was not informed by the presiding judge, or anyone else, of a right to counsel, appointed or retained. Nor did the court advise him of the nature of the charge against him, the possible penalty, or that he had a right to make objections, cross-examine witnesses, present witnesses in his own behalf, or "appeal" to the circuit court of Pulaski County where he would have been entitled to a trial *de novo* before a jury, Ark. Stat. Ann. §§44-115, 509 (1947). After receiving testimony, the trial court asked both respondent and his co-defendant if they wished to make a statement. Both declined.

On October 20, 1965, respondent filed, as a poor person, a petition for a writ of habeas corpus, or in the alternative

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[1] The ordinance is reprinted in Appendix C of the petition for writ of certiorari.

for a writ of error coram nobis, in the trial court, the municipal court of the City of Little Rock, alleging, *inter alia,* that he had been tried and convicted in violation of state and federal constitutions "without the benefit of counsel and without being advised of his right to counsel." Respondent requested relief against his unconstitutional restraint, conviction, sentence, and fine and sought release on his own recognizance pending consideration of the issues raised by the petition. The municipal court denied the petition October 27, 1965 and the same day a petition for habeas corpus, or alternatively for writ of error coram nobis was filed in the circuit court of Pulaski County. That court denied the petition on October 28, 1965.

The following day, respondent sought relief by petition for habeas corpus in the Supreme Court of Arkansas. On November 3, 1965, the supreme court entered an order staying execution of respondent's sentence pending consideration of the petition and releasing him on $100 bond. On December 20, 1965, the court denied the petition on the ground that Winters was charged in a misdemeanor, not "a felony case" and was not entitled to counsel, 239 Ark. 1151, 397 S.W.2d 364 (1965). A petition for writ of certiorari was denied, Justices Stewart and Black dissenting, 385 U.S. 907 (1966).

After denial of certiorari, Winters filed a petition for a writ of habeas corpus in the district court alleging (1) that he was "presently threatened with and subject to remission" to serve out his sentence and (2) that his conviction and sentence were unconstitutional in that:

1. He was unconstitutionally tried and convicted without benefit of counsel and without being advised of his right to counsel;

2. The penalties assessed against him by the municipal court of Little Rock deprived him of Fourteenth Amendment Rights in that the imposition of 254 days in jail in default of payment of his fine and court costs of $254.00 constituted imprisonment for no other reason than poverty;

3. The ordinance pursuant to which he was convicted violated the Due Process Clause of the Fourteenth Amendment in that it is vague, ambiguous, and uncertain.

On February 14, 1967, the district court dismissed the petition on the ground that, because he had been released on bond, respondent was not "in custody" so as to permit him to file a petition for a writ of habeas corpus. On application for a certificate of probable cause, the court of appeals, on March 31, 1967, remanded the cause to the district court "for a rehearing on the merits in conformity with the teaching of the Supreme Court of the United States in *Jones* v. *Cunningham,* 371 U.S. 236." On remand, the district court held that respondent's conviction and sentence of imprisonment for nine and one-half months constituted the adjudication of a "serious offense," at which the assistance of counsel was constitutionally required:

> We do say here, . . . that the interaction of the "dollar-a-day" statute of Arkansas with a $254 fine plus a 30-day jail sentence constituted a "serious offense," and the failure of the trial court to notify petitioner of his right to the assistance of counsel and offer him counsel if he was unable financially to retain counsel, rendered the judgment of conviction and sentence constitutionally invalid (281 F. Supp. 793, 801-02)

On appeal to the court of appeals, the judgment of the district court was affirmed:

> Appellants are correct in suggesting that the Supreme Court of the United States has not expressly extended the Sixth Amendment right to assistance of counsel to misdemeanor cases. We are firmly convinced, however, from the rationale of the decisions of the Supreme Court that the fundamental right to counsel extends to a situation where, as here, the accused has been found guilty of an offense, which has resulted in imprisonment for approximately nine and one-half months.
>
> The Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), in holding that the Sixth Amendment guarantee of the right to assistance of counsel is applicable to the states through the Fourteenth Amendment, proclaimed: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344.
>
> Appellants seem to regard the *Gideon* opinion as limiting the application of the Sixth Amendment to offenses which are characterized as felonies. We are not persuaded that the *Gideon* Court intended to circumscribe the application of its decision to such narrow confines. The Court did not draw a line between felonies and any and all misdemeanors. Indeed, consideration of the opinion in context leads us to conclude that the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time. (407 F.2d 125, 127, 128)

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Held That the Arkansas Restriction of Appointment of Counsel at Trial to Those Indigent Defendants Charged With Felonies Under Arkansas Law Violates the Sixth and Fourteenth Amendents to the Constitution.

Respondent's Sixth and Fourteenth Amendment rights to the assistance of counsel are established by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). While it is true that Gideon was charged with a felony under Florida law, the decision of this Court in his case adumbrated an indigent's right to the assistance of counsel in terms and for reasons which do not admit of restriction on the basis of whether a state classifies the particular offense charged as a felony or a misdemeanor. The Sixth Amendment's right to the assistance of counsel applies "In all criminal prosecutions" and in *Gideon* the Court spoke broadly of "any person haled into court" and the right of "one charged with crime" (Id. at 344). It is difficult, moreover, to conceive the basis of a distinction which would find the right to counsel "a fundamental right essential to a fair trial" when a crime is denoted a felony and not when it is denoted a misdemeanor.[2] As the Court stated:

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[2] In *Evans* v. *Rives*, 126 F.2d 633 (D.C. Cir. 1942), a case involving a federal misdemeanor, it was suggested that the right to counsel applied only to serious offenses. The court replied, "No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority and know of none making such a distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively denied his liberty by a sentence to a year in jail for the crime of nonsupport of a minor

> . . . in our adversary system of criminal justice any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. (Ibid.).

This truth is as "obvious" for misdemeanor as for felony trials.

Whatever the limits, if any, of the constitutional requirement with respect to provision of counsel in traffic and other petty offenses, the distinction between felonies and misdemeanors adopted by the Supreme Court of Arkansas in respondent's case cannot serve to deny his right to counsel. In Arkansas, the distinction between felony and misdemeanor is arbitrary and cannot be rationally justified in terms of considerations which legitimately affect either the state's or a defendant's interest in provision of counsel. Generally: "A felony is an offense in which the punishment is death or confinement in the penitentiary." [3] "All other public offenses are misdemeanors." [4] Certain misdemeanors, however, may result in imprisonment up to three years at the penitentiary, which is in excess of the penitentiary sentences for certain felonies.[5] Indeed, many serious crimes are punishable as misdemeanors[6] and there are felonies

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child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such a loss for a long one" (126 F.2d at 638).

[3] Ark. Stat. Ann. §41-103 (1947).

[4] Ark. Stat. Ann. §41-104 (1947).

[5] See e.g. Ark. Stat. Ann. §41-805 (1947) making a third conviction of illegal cohabitation a misdemeanor punishable by imprisonment in the penitentiary for not less than one, nor more than three, years; Ark. Stat. Ann. §41-1501 (1947).

[6] See e.g. Ark. Stat. Ann. §41-605 (1947) (assault with a deadly weapon).

that are punished no more heavily than misdemeanors.[7] In this case, respondent has been convicted of charges of immoral conduct, cf. *Callan* v. *Wilson,* 127 U.S. 540, 549 (1888), and sentenced to nine and one half months in jail for a misdemeanor. As the line of demarcation between felony and misdemeanor in Arkansas law is totally unrelated to the reasons that the right to counsel is constitutionally protected, a rule which makes provision of counsel turn on that distinction, itself violates the Equal Protection Clause. *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); see *McLaughlin* v. *Florida,* 379 U.S. 184, 190 (1964).

It is not, however, the artificiality of the Arkansas standard which alone supports denial of certiorari. If as *Gideon, supra,* held, counsel is required for a fundamentally fair trial, to ensure the integrity of the fact finding process, and that justice is done, assistance of a lawyer cannot be rationally withheld simply because one class of offenses may be punished more severely than another. Respondent's liberty is infringed if he is incarcerated for nine and one half months or for one year and one day; whether in the county penal farm or state penitentiary. The adversary system will operate no better because a charge carries with it a lesser penalty. In both classes of cases a defendant without counsel "lacks both the skill and knowledge adequately to prepare his defense even though he has a perfect one" *Powell* v. *Alabama,* 287 U.S. 45, 68, 69 (1932).

It was also recognized in *Gideon, supra,* that the fundamental right of one charged with crime to counsel cannot be realized "if the poor man charged with crime has to face his accuser without a lawyer to assist him" (372 U.S. at 344). The unfairness of permitting counsel for the rich while the poor go unrepresented continues if the right to

[7] See e.g. Ark. Stat. Ann. §§41-216, 806, 3215 (1947).

counsel is restricted only to those charged with felonies. The Due Process and Equal Protection Clauses are not satisfied by a state rule which permits the kind of trial a man enjoys to depend on the amount of money he has *except* in felony cases. Numerous decisions of the Court establish beyond question the inadmissibility of distinction between rich and poor in granting rights fundamental to the integrity of the fact finding process.[8]

In short, the court of appeals correctly held that the assistance of counsel is a fundamental right which cannot be denied on the basis of poverty and that neither the language of *Gideon, supra,* nor the reasons given to support it, permit denial of a fundamental right to an indigent merely because he may not have been charged with a crime labelled a felony under state law.

It is, therefore, no accident that the increasing trend of American jurisdictions is to reject any limitation on the right to counsel where the accused is charged with a misdemeanor and—at the very least—to find that the right of counsel attaches in any case where, as here, the penalty is greater than six months imprisonment. As early as 1963, the American Bar Foundation's study of this problem found:

> Two impressions emerge from the material gathered in the survey, which in most states was conducted during the summer and early fall of 1963. . . . The other impression is that the number of jurisdictions providing counsel in misdemeanors was on the increase at the time of the survey, partly in response

[8] *Griffin* v. *Illinois,* 351 U.S. 1, 17-19 (1956); *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958); *Burns* v. *Ohio,* 360 U.S. 252 (1959); *Douglas* v. *Green,* 363 U.S. 192 (1960); *Smith* v. *Bennett,* 365 U.S. 708 (1961); *Douglas* v. *California,* 372 U.S. 353 (1963).

to growing recognition that a good system of justice requires counsel for the misdemeanor as well as for the felony. 1, Silverstein, *Defense of the Poor in Criminal Cases in American State Courts,* pp. 126-127 (1965: American Bar Foundation, Chicago, Ill.).

Three years later the National Conference of Commissioners on Uniform State Laws took the view that counsel should be provided whenever the penalty "includes the possibility of confinement." However, the Commissioner's Model Defense of Needy Persons Act §§1, 2 (1966) contains a bracketed limitation to offenses punishable for more than six months in deference to "differences" as to whether the right extends to all cases or only to cases where the penalty is more than six months. The American Bar Association's Project on Minimum Standards, moreover, has decided that "Counsel should be provided in all criminal proceedings . . . regardless of their denomination as felonies, misdemeanors or otherwise" *Providing Defense Services* §4.1 (1967).

Several state courts have declined to find a right to counsel in misdemeanor cases but it is noteworthy that with few exceptions those cases arose in jurisdictions where the federal courts have held that habeas relief is available to void misdemeanor convictions obtained without assistance of counsel. Compare *Harvey* v. *Mississippi,* 340 F.2d 263 (5th Cir. 1965); *McDonald* v. *Moore,* 353 F.2d 106 (5th Cir. 1965); *James* v. *Headley,* —— F.2d —— (5th Cir. 1969, No. 25,892); *Bohr* v. *Purdy,* —— F.2d —— (5th Cir. 1969, No. 26,637); *Petition of Thomas,* 261 F. Supp. 263 (W.D. La. 1966); *Rutledge* v. *City of Miami,* 267 F. Supp. 885 (S.D. Fla. 1967); *Brinson* v. *Florida,* 273 F. Supp. 840 (S.D. Fla. 1967) with *State* v. *Thomas,* 190 So.2d 909 (La. 1965) and *Fish* v. *State,* 159 So.2d 866 (Fla. 1964); *Arbo* v. *Heg-*

strom, 261 F. Supp. 317 (D. Conn. 1966), with *State* v. *DeJoseph,* 222 A.2d 752 (1966), cert. den. 385 U.S. 982 (1966). And in *Duncan* v. *Louisiana,* 391 U.S. 145, 149 (1968) this Court rejected the misdemeanor-felony line as a constitutional basis for state denial of the right to jury trial, a right which *Duncan* acknowledges is not fundamental to a fair trial to the extent of the right to counsel.

Arkansas urges that the state's obligation to provide counsel for petitioner does not extend to one sentenced to nine and one half months in jail. Several reasons have been presented. First, it is contended that because of a claimed impossibility of furnishing counsel to *each and every person* accused of crime, counsel need not be appointed until the state legislature has acted to solve the problem. The premise of this argument is surely faulty, given the widespread acceptance of public responsibility to provide representation for misdemeanor defendants. The State failed to present any evidence in the trial court supporting a contention that it is incapable of meeting the burden so many other jurisdictions have met. But even granting the premise *arguendo,* the result would be to support, not detract from, the decision below that offenses punishable by nine and one half months confinement require appointment of counsel, for the court below's resolution made no attempt to include appointment in petty offense cases.

The state contended that a six month limitation will not relieve the state's burden because Ark. Stat. Ann. §19-2416 (1947) requires that fines, if not paid, be worked out at the rate of $1.00 per day. Respondent contends that the statute is unconstitutional, *infra* pp. 13-17, but even were it valid it could not be employed to justify denial of counsel to respondent. Its repeal or modification provides a convenient method to alleviate any burden caused by the obligation to provide representation in misdemeanor cases. The state cannot—on the one hand—contend that provision of counsel

is burdensome and—on the other—define offenses and punismments in a way which needlessly maximizes the burden.

Once it is accepted—as we believe it must be, in light of *Duncan, supra* and *Frank* v. *United States,* 37 U.S. L. Week 4437 (May 19, 1969)—that the federal courts are required to address themselves to the question of which petty offenses, if any, are exempt from the constitutional protection of right to counsel, then there is impressive authority for the proposition that—regardless of the outer boundary of the right—offenses punishable by more than six months, especially when they involve moral delinquency, require appointment of counsel. Cf. *Callan* v. *Wilson supra; District of Columbia* v. *Clawans,* 300 U.S. 617 (1937); *Shick* v. *United States,* 195 U.S. 65 (1906); *Duncan* at 391 U.S. 145 (1968). Cases adopting the six months rule as the boundary of the federal right to jury trial (at least in criminal contempt cases, where the rule is likely most tolerant of non-jury trials), such as *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966),[9] are especially persuasive, for the Court made perfectly plain in *Duncan,* 391 U.S. at 158, despite incorporating the jury trial requirement of the Sixth Amendment in the Fourteenth, that "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a particular defendant may never be as fairly treated by a judge as he would be a jury." Cf. *Destefano* v. *Woods,* 392 U.S. 631 (1968). *Gideon* v. *Wainwright,* however, stands for the proposition that a fair trial without counsel is hardly possible.

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[9] *Cheff* must be read as adopting and applying a six month standard to the Court's famous dictum in *United States* v. *Barnett,* 376 U.S. 681, 695, n. 12 (1964):

> Some members of the Court are of view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.

II.

The Unconstitutionality of Arkansas' Dollar-a-Day Statute Establishes the Correctness of the Judge Below.

The municipal court sentenced petitioner to 254 additional days in jail because of his inability to pay a fine and court costs of $254.00, pursuant to Ark. Stat. Ann. §19-2416 (1947). The dollar-a-day statute and its application in this case where challenged under the Eighth and Fourteenth Amendments by respondent in the district court and the court of appeals. Those courts did not reach the question, though squarely presented by the petition for habeas corpus, because they found that denial of respondent's right to counsel violated the Fourteenth Amendment and required the vacation of his conviction on that distinct ground. But since the unconstitutionality of Ark. Stat. Ann. §19-2416 supports the judgment below, it is properly urged here as a ground supporting denial of certiorari. *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

We submit that the statute is palpably unconstitutional. A system which enforces the payment of fines by imprisonment clearly effects different treatment of convicts depending on whether they are with or without funds to pay the fine. Two persons convicted of identical offenses under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines, will walk out of court or be transported to the state jail depending entirely on how much money they have. As former Justice Goldberg has written:

> The "choice" of paying a $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown.

Goldberg, *Equality and Government,* 39 N. Y. U. L. Rev. 205, 221 (1964).

Respondent submits that a system of imprisonment for failure to pay a fine, unmitigated by any effort to accommodate itself to the poverty of some defendants, makes the real sentence a man gets depend on the amount of money he has, and that *Griffin* v. *Illinois,* 351 U.S. 12 (1956) and its progeny, have made clear that such a system is forbidden. E.g. *Burns* v. *Ohio,* 360 U.S. 252 (1959) (filing fee for motion for leave to appeal); *Smith* v. *Bennett,* 365 U.S. 708 (1961) (filing fee for state habeas corpus petition); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) (appointed counsel at trial); *Douglas* v. *California,* 372 U.S. 353 (1963) (appointed counsel for first appeal as of right). It should be noted that under an Arkansas law the indigent defendant is deprived of his liberty not because it is thought that the protection of the community or his reformation require it, but simply because he is poor and unable to pay the fine imposed:

> . . . when a fine is imposed it is tantamount to a declaration that neither the safety of the community nor the welfare of the offender requires the imprisonment of the offender and that the assumed values of punishment can be accomplished without imprisonment. Sutherland and Cressey, *Principles of Criminology* at 277 (5th ed. 1955).

Chief Justice McRuer of the High Court of Justice for Ontario, Canada has put it succinctly:

> A modest fine, with an alternative prison term, imposed upon a man who has not the ability to pay is in fact a sentence to prison, while a very substantial fine imposed on one of ample financial resources is an inconsequential punishment. McRuer, *Sentences,* 27 Can. Bar Rev. 1001, 1006 (1949).

Due process and equal protection do not sanction a system which makes a man's freedom dependent upon his ability to pay. Cf. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668 (1966).[10]

In a case indistinguishable from this, *People* v. *Saffore*, 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966), the New York Court of Appeals held that to make "a defendant who has no money or property . . . serve out a fine at $1 per day, in addition to the maximum term of imprisonment," violated both the state and federal constitutions:

> Since imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine, we should now hold that it is illegal so to imprison a defendant who is financially unable to pay.[11]

The court found its holding compelled particularly by the circumstance that the dollar-a-day confinement in de-

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[10] Authorities who have considered the matter recognize the unfairness of the practice:

> In general one of the over-riding principles repeatedly urged is that the financial capabilities of the offender should be taken into consideration, because unless fines are proportioned to the defendant's ability to pay, they will be treated lightly by persons of means and will be an unbearable burden to the poor. Rubin, THE LAW OF CRIMINAL CORRECTION 238 (West Publ. Co. 1963).

The federal judges' pilot institute on sentencing recommended that:

> No fine should be imposed unless it reasonably appears that the defendant is financially able to pay it either at once or in installments under probation. *Pilot Institute on Sentencing under the Auspices of the Judicial Conference of the U.S.*, 26 F.R.D. 231, 380 (1959).

See also NCCD Advisory Council of Judges, GUIDES FOR SENTENCING 22 (1957); MODEL PENAL CODE Sec. 7.02 (Official draft, 1962).

[11] A rational purpose of imprisoning an indigent under an alternative fine-imprisonment sentence is hard to find. Coercion of the

fault resulted in the defendant being sentenced to a period of imprisonment in excess of the statutory maximum—a circumstance also present here.[12] Accord: *Sawyer* v. *District of Columbia,* 238 A2d 314 (D.C. Ct. App. 1968).

Moreover, in treating a convict without funds differently than one with money to pay a fine a sentencing court is, in effect, punishing the former because of his status as a poor person. In *Robinson* v. *California,* 370 U.S. 660 (1962) the Court held that the Eighth Amendment's prohibition of cruel and unusual punishment, applicable to the states through the Due Process Clause, proscribed California's attempt to make criminal an individual's status of narcotic addition. (Id. at 667). The failure of the defendant in this case to pay the fine was an "involuntary symptom" of his involuntary poverty, cf. *Ricks* v. *United States,* —— F.2d —— (D.C. Cir. 1969, No. 20,919); *Fenster* v. *Leary,* 20 N.Y.2d 309, 229 N.E.2d 426 (1967); *Baker* v. *Binder,* 274 F. Supp. 658 (W.D. Ky. 1967). To imprison the respondent for this reason, no matter how small the fine, or how short the term of incarceration, is cruel and unusual punishment of him for being poor:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual.

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indigent to pay is clearly a rationally impossible motive, as the New York Court of Appeals noted in *People* v. *Saffore, supra,* see also 21 Am. Jur. Ed., CRIMINAL LAW, §603, and the cases cited in note 4 there. The indigent simply lacks the ability to pay. Coercion of a friend or relative to pay is a possible *sub rosa* purpose, but seems opposed to our fundamental understanding that no man should be penalized for the crimes of his friend or relative in which he himself did not participate.

[12] Compare *United States ex rel. Privitera* v. *Kross,* 239 F. Supp. 118 (S.D.N.Y. 1965) aff'd 345 F.2d 533 (2nd Cir. 1965) where the court relied on the fact that the state judge could have imposed a straight jail sentence up to a year in prison apart from the fine. In *Winters* case, however, the fine permitted the court to impose over eight fold more time in prison than the maximum.

> But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold. *Robinson* v. *California, supra,* at 667.

As the district court observed, despite the fact that the dollar-a-day statute is over 75 years old and the statute's standard of value is totally inconsistent with modern standards, compare 29 U.S.C. §206 (minimum wage: $1.60 per hour), the Arkansas legislature has not amended the rate at which an indigent "works off" his fine. Thus the state has not only chosen to punish the status of poverty but has done so at an unconscionable rate, unconstitutionally disproportionate to the value of petitioner's labor. *Weems* v. *United States,* 217 U.S. 349 (1910); compare U.S. Const. XIII.

CONCLUSION

For the foregoing reasons, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

JOHN WALKER
1820 West 13th Street
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

Attorneys for Respondent